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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF OF THE INSTITUTE OF REAL ESTATE MANAGEMENT OF THE NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I.	
THE ESCONDIDO ORDINANCE, IN CONJUNCTION WITH CALIFORNIA'S MOBILEHOME RESIDENCY LAW, EFFECTS A TAKING OF PETITIONERS' PROPERTY	4
A. THE TAKING OF PRIVATE PROPERTY .	4
B. RENT CONTROL ORDINANCES	6
C. THE INVALIDITY OF THE ESCONDIDO RENT CONTROL SCHEME	9
1. THE IMPACT OF *HALL* v. *CITY OF SANTA BARBARA*	9
2. THE UNCONSTITUTIONAL BASIS OF THE ORDINANCE	11
D. ADDITIONAL ERRORS OF THE CALIFORNIA COURT OF APPEAL	11
1. INTRODUCTION	11
2. TAKINGS/COMPENSATION	12
II.	
THE ESCONDIDO ORDINANCE DEPRIVES PETITIONERS OF DUE PROCESS OF LAW .	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases PAGE

Azul Pacifico v. *City of Los Angeles*, 740 F. Supp. 772 (C.D.Cal. 1990), *aff'd*, 1991 U.S. App. LEXIS 26352 (9th Cir. 1991) 7, 10, 16, 18, 21, 22, 23

Block v. *Hirsh*, 256 U.S. 135 (1921) 6

Chicago, Burlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1897) 4

FCC v. *Florida Power Corp.*, 480 U.S. 245 (1987) . 17

Fisher v. *City of Berkeley*, 475 U.S. 260 (1986) . 6

Fresh Pond Shopping Center, Inc. v. *Callahan*, 464 U.S. 875 (1983) 6

Hall v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. den.*, 485 U.S. 940 (1988) 3, 7, 9, 13, 14, 18

Hawaii Housing Authority v. *Midkiff*, 467 U.S. 229 (1984) 4, 9, 19

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 14

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 5, 10, 14

Nollan v. *California Coastal Commission*, 483 U.S. 825 (1987) 5, 9, 18

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104, *rehearing den.*, 439 U.S. 883 (1978) 6

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 5

Pinewood Estates of Michigan v. *Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990) 7, 8, 15

San Diego Gas & Electric Co. v. *San Diego*, 450 U.S. 621 (1981) 5

Woods v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) 6

Yee v. *City of Escondido*, 224 Cal. App.3d 1349, 274 Cal. Rptr. 551 (1990), *review den.*, 1991 Cal. LEXIS 353 (Cal. 1991) 10, 12, 13, 17

Constitutions and Statutes

United States Constitution, Amendment V 2, 3, 4, 11, 18, 23

United States Constitution, Amendment XIV 3, 11, 18, 23

Cal. Civ. Code §§ 798-798.8 ..... 6, 7

Escondido Municipal Code, Article V, Sections 29-101 through 29-108 ... 4, 7, 8, 9, 11, 13, 15, 17, 19, 20, 22, 23

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INTEREST OF THE *AMICUS CURIAE*

The Institute of Real Estate Management of the National Association of REALTORS® ("IREM") is a professional society whose membership includes 9,000 individuals who are real property and asset managers in the United

This *amicus curiae* brief is submitted with the written consent of all parties filed with the Clerk of the Court.

States and Canada. Founded in 1933 by individuals concerned with establishing ethical and educational standards of practice for property management, the members of this professional not-for-profit organization manage on behalf of property owners in excess of $1.1 trillion in real estate assets, including over 200,000 mobile home spaces. IREM's members have met stringent qualifying standards in education, experience, and ethical conduct, and are designated as CERTIFIED PROPERTY MANAGERS.®

The activities of IREM and its membership as the managers and agents for property owners are inextricably dependent upon the vitality of the freedoms protected by the United States Constitution, including most centrally the rights of private ownership and control of private property. The scope of those rights *vis-a-vis* entrenchments or restrictions by units of government are at stake in this case.

More narrowly but also of great significance to IREM, the Court's decision on this issue will have a direct impact on the management operations and obligations of every property manager who may confront rent control over mobile home park pads specifically or rent control ordinances generally. Accordingly, IREM has a substantial interest in assuring the enforcement of the full protection afforded property interests by the Fifth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT

1. The California Court of Appeal erred by disregarding the holding of the United States Ninth Circuit Court of Appeals in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), that the combined effects of a municipal mobile home rent control ordinance and the State of California Mobilehome Residency Law result in a taking of the property of mobile home park owners for which compensation is required by the Fifth and Fourteenth Amendments to the Constitution.

2. The California Court of Appeal erred by not holding the Escondido Mobilehome Rent Control Ordinance to be constitutionally invalid because it deprives mobile home park owners of the economically viable use of their property without advancing any legitimate state interest, thus denying their right to substantive due process under the Fifth and Fourteenth Amendments to the Constitution.

ARGUMENT

I.

THE ESCONDIDO ORDINANCE, IN CONJUNCTION WITH CALIFORNIA'S MOBILEHOME RESIDENCY LAW, EFFECTS A TAKING OF MOBILE HOME PARK OWNERS' PROPERTY

A. The Taking of Private Property

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation to the property owner. *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897). Even with the "just compensation" required by the Fifth Amendment, there can be no taking of private property in the absence of some "justifying [public] purpose." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241 (1984), quoting *Thompson* v. *Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937), citing *Missouri Pacific R. Co.* v. *Nebraska*, 164 U.S. 403 (1896). The California Mobilehome Residency Law and the City of Escondido Mobilehome Rent Control ordinance together operate to take private property without compensation and without a public purpose.[1]

In the exercise of its police power, a government body can place restrictions on a private owner's property, provided the restrictions satisfy two conditions. First, they must be within the scope of the state's police power, "substantially related to the advancement of the public

[1] This combination, as precedents from other jurisdictions will demonstrate, is not unique to California.

health, safety, morals or general welfare." *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 656 (1981), Brennan, J., dissenting.

Second, even if pursuant to a proper exercise of the police power, the restrictions must not go so far as to wholly deprive the owner of the use of the property or deny the owner "economically viable use of his land." *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987), quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). If restrictions have this effect, and go beyond the permissible scope of the police power, the Constitution requires the property owner to be compensated. "If regulation goes too far, it will be recognized as a taking," in Justice Holmes' words. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

This Court's jurisprudence in the eminent domain context has divided such cases into two classes: (1) those involving "takings" by physical occupation; and (2) those involving "takings" by regulation.[2]

Physical occupation takings cases may involve occupation of the property directly by the sovereign or by a private party whose occupation is ordered, directed or permitted by the sovereign. *Id.* at 434-435. In any such case, the obligation of compensation is immediate, arising from the physical occupation of the property by someone other than the property owner. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

In regulatory takings cases, the value or usefulness of private property is either eliminated or diminished so as to constitute a taking of that property. In such cases, the

[2] *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

physical occupation of the property is not required. *See, e.g., Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-124, *rehearing den.*, 439 U.S. 883 (1978). The California law and Escondido ordinance at issue here, but by no means unique to this case, constitute such a taking.

B. Rent Control Ordinances

Rent control schemes have generally and consistently been recognized by this Court as within the permissible scope of the police power and not rising to the level of a regulatory taking. Thus such ordinances are sustained in the face of challenges alleging either they constituted a taking of private property requiring compensation or they did not materially and substantially advance a legitimate public interest. *See, e.g., Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986); *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Block* v. *Hirsh*, 256 U.S. 135 (1921).

However, because of the manner in which the Escondido ordinance operates in synchronization with the California Mobilehome Residency Law, its effect is distinguishable from previous rent control practices upheld by this Court, and unlike those, it is constitutionally indefensible.

California's Mobilehome Residency Law regulates mobile home parks in the state. *Cal. Civ. Code* §§ 798-798.8. By restricting how mobile home park owners may terminate or refuse to renew a tenancy to only those limited reasons specified in the Law, all of which require proof of some tenant misconduct, California effectively grants tenants a permanent tenancy, absent such overt misconduct. *See Cal. Civ. Code* § 798.55(b).

The California law permits the tenant to transfer pad occupancy rights to a third-party purchaser of the tenant's mobile home. Further, it requires the park owner to accept the third-party purchaser as a successor tenant.[3] Thus, by law a California mobile home park tenant may sell the personal property, the home or unit, to a purchaser of his own choosing, thereby requiring the real property owner, the park owner, to enter into a lease with the purchaser.

The California law does not impose rent controls, nor does it require a "vacancy decontrol"[4] provision in local

[3] The successor tenant need only demonstrate the financial ability to pay rent and other charges, and that there are no other grounds to believe, based on other tenancies, that the purchaser will violate the park's rules and regulations. *See Cal. Civ. Code* §§ 798.73-798.74.

[4] "Vacancy decontrol" in a rent control ordinance permits renegotiation of lease terms, including rent increases, upon the termination of one leasehold and introduction of a new tenant. Vacancy control, therefore, refers to a rent control ordinance which precludes rent increases upon termination of a leasehold, either explicitly or by omitting termination or substitution of a new mobile home owner as tenant as a basis for a rent increase.

In the mobile home context, vacancy decontrol would permit lease term revisions upon the sale of a mobile home on-site in a rent-controlled park. The Escondido ordinance, like those before the courts in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), *Azul Pacifico* v. *City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990), *aff'd*, 1991 U.S. App. LEXIS 26352 (9th Cir. 1991), and *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990), lacks vacancy decontrol. This feature of the ordinance is at the core of petitioners' challenge to the constitutionality of the ordinance, as it makes possible both the transfer of the park owners' property interest to the tenant and the tenant's transfer of that property interest to the purchasing, incoming tenant. Thus, the absence of vacancy decontrol is primarily responsible for the irrational effects of the ordinance in increasing rather than controlling or reducing mobile home costs for new tenants in rent controlled mobile home parks. This effect provides the basis for petitioners' due process challenge to the ordinance. *Infra* at 17-23.

rent control ordinances. If the law also required vacancy decontrol, while obliged to rent to persons thrust upon a park owner by a current tenant, the park owner would be free to charge new tenants the market rental price for the pad.

However, by the operation of local rent control ordinances which lack provisions for vacancy decontrol, including the ordinance adopted by Escondido, mobile home park owners are prevented from freely negotiating new rent terms with successor tenants who purchased their mobile homes from the existing tenants.

The distinctions from the apartment rent control context, and the reason for the ordinance's invalidity, were summarized by the United States Third Circuit Court of Appeals in *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990), involving a very similar combination of mobile home tenant control by state statute and a local mobile home rent control ordinance in New Jersey (898 F.2d at 355):

> Two significant differences exist between mobile home regulations now subject to the New Jersey rent control statute and the Barnegat Ordinance and the typical urban rent control. First, in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right.

Like the New Jersey regulation in *Pinewood*, the Escondido ordinance, in conjunction with California's Mobilehome Residency Law, takes from the park owner and transfers to current tenants a property right belonging to the former and does so, essentially, in perpetuity.

C. The Invalidity of the Escondido Rent Control Scheme

Escondido's Mobilehome Rent Control Ordinance is subject to a finding of invalidity by this Court on two grounds. First, because the ordinance lacks a provision for vacancy decontrol and operates in conjunction with California's Mobilehome Residency Law, it creates a physical occupation of the park owner's property by tenants not of the owner's choosing. This results in a taking of the owner's property requiring the payment of compensation. The ordinance, however, does not provide for such compensation.

Second, because the ordinance fails to further any legitimate public interest within the scope of the sovereign's police power, its enactment and effect constitute a denial of substantive due process. The ordinance, like the building permit requirement found unconstitutional in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), amounts to an attempt to take private property without compensation and without a "justifying public purpose." *See Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241.

1. The Impact of *Hall* v. *City of Santa Barbara*

Petitioners relied on the opinion of the United States Ninth Circuit Court of Appeals in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988). It is a case with facts very similar to those presented here. *Hall* involved a challenge to a similar local mobile home rent control ordinance lacking vacancy decontrol and operating in conjunction with the California Mobilehome Residency Law. In *Hall*, which like this case was appealed from a dismissal in the trial court, the Ninth Circuit held plaintiffs had stated a claim for an unconstitutional taking, and should be permitted to try the case on its merits.

On remand, the trial court found the operation of the two enactments did constitute a taking of the mobile home park owners' property, and ordered they be paid just compensation as required by the Constitution. *See Hall* on remand, attached as Exhibit A to Appellants' Brief in the California Court of Appeal. Thereafter, the reasoning of *Hall* was adopted and followed by the Third Circuit in *Pinewood*, and the United States District Court in *Azul Pacifico* v. *City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990). On November 1, 1991, subsequent to the rulings in this case, *Azul* was affirmed by the Ninth Circuit. 1991 U.S. App. LEXIS 26352 (9th Cir. 1991).

In spite of these precedents, the trial court sustained Escondido's demurrer to the Complaint and dismissed the case. This dismissal was affirmed by the California Court of Appeal, which found the reasoning in *Hall* "unpersuasive." The Supreme Court of California denied Petitioners' Petition for Review, with two Justices dissenting from that denial. *Yee* v. *City of Escondido*, 224 Cal. App.3d 1349, 1354, 274 Cal. Rptr. 551 (1990), *review den.* 1991 Cal. LEXIS 353 (Cal. 1991). This Appeal followed.

Contrary to the suggestion of the California Court of Appeal that *Hall* and its analysis represent a departure from "traditional" takings analysis, *Yee*, 224 Cal. App.3d, at 1354, the *Hall*, *Azul* and *Pinewood* decisions are supported by substantial authority from this Court. Put most simply, these recent cases hold that, in combination, the rent control ordinances and the state statutes effect a taking by physical occupancy precisely analogous to that found by this Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

2. The Unconstitutional Basis of the Ordinance

Amicus respectfully proposes this Court adopt and apply to this and similar state/local takings the reasoning of the Ninth and Third Circuits, and conclude either that mobile home rent control ordinances which fail to include provisions for "vacancy decontrol" work a taking of the owners' property for which the Fifth and Fourteenth Amendments require just compensation or that they be declared unconstitutional.

This unconstitutional taking results from the interplay of the local ordinance and the state statute. A tenant in a mobile home subject to the two laws receives a near permanent right of possession of the leased pad. This property right in the tenant can be, and is, sold by the tenant to a third-party purchaser of the mobile home, and results in the sale by the tenant of the right to occupy that pad at the below-market rental mandated by the rent control ordinance. The result of the creation of this transferable and valuable property right is to take from the owner, and transfer to each current tenant, the separable element of the park owner's valuable real property right in the park and combine it with the tenant's personal property interest in the mobile home. Because this transfer is effected entirely by operation of the ordinance in the context of the state law, it constitutes a taking of the park owner's property requiring either compensation under the Constitution or a declaration that the rent control ordinance is unconstitutional.

D. Additional Errors of the California Court of Appeal

1. Introduction

Petitioners and other *amici* have presented this Court with precedent amply supporting the holdings of the *Hall*,

Azul and *Pinewood* cases and their conclusion that a taking is effected on the facts and law presented here. *Amicus curiae* IREM focuses the remainder of its brief specifically on the underlying errors in the opinion of the California Court of Appeal with the objective that this focus will assist the Court in resolving the narrow constitutional issue presented that mobile home rent control ordinances, such as Escondido's, which lack vacancy decontrol provisions, are unconstitutional. Upon such a holding, *amicus* urges the Court to remand this case for further proceedings to determine the compensation due Petitioners for the taking of their property, or a declaration that ordinances such as the Escondido ordinance are constitutionally invalid as depriving mobile home park owners of the due process of law guaranteed them by the Constitution.

2. Takings/Compensation

There are two fundamental flaws in the reasoning of the California Court of Appeal as to the proper understanding of the "takings" provision of the Fifth Amendment:

> 1) The Court of Appeal, focusing on whether the rent set by the Escondido ordinance was "fair and reasonable," failed to understand the basis of Petitioners' claim of a "taking"; and
>
> 2) The Court of Appeal failed to understand that a regulatory taking must also satisfy police power limitations to pass constitutional muster.

The California Court of Appeal simply failed to grasp, and thus failed to respond to, the fundamental economic nature of the Petitioners' claim. The court acknowledged the Escondido rent control ordinance "effects a transfer of value from landlords to tenants." *Yee*, 224 Cal. App.3d

at 1354. The "critical question" for the court was "Whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable?" *Id.* Noting the mobile home park owners failed even to raise that question, the court then "assume[s] the rents provided for by the ordinance are fair," and therefore that "there is no 'taking.' " *Id.*

The problem with the California court's analysis is that the gravamen of Petitioners' complaint is not that the rents established by the Escondido ordinance fail to meet some abstract standard of fairness, but rather, that the ordinance, in conjunction with the California Mobilehome Residency Law, expropriates the mobile home park owners' right to realize one of the most important "sticks in the bundle of rights" which together constitute private property rights, i.e., the right to control access to and possession of the owners' property. This fundamental right has been taken from the owners and transferred to their current tenants.

In *Hall*, the court specifically addressed the conclusion that reasonable rent provisions eliminate a "taking" (833 F.2d at 1278):

> The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. [citation omitted] Whether compensation is adequate is an inquiry separate from whether there has been a taking. In *Loretto*, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate.

The court's conclusion below that the failure to allege the rents are unfair eliminated the basis for the takings claim

made by the Petitioners simply missed the point. The California Court of Appeal may, perhaps, refuse to be influenced or controlled by the reasoning of *Hall*, *Azul* and *Pinewood*, but if it elects to dismiss the constitutional positions adopted by those cases, it must at least demonstrate that it has recognized and considered them.

In short, the California Court of Appeal's inability or refusal to recognize that Petitioners' takings claim was based on an effect of the ordinance separate from the level of permitted rent, kept it from even attempting to properly assess the nature of Petitioners' claims. It is the loss, essentially in perpetuity, of the owners' right to occupy the property, or to determine who may occupy it, that is the source of the taking in this case.

As the *Hall* court noted, "[T]he right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." *Hall*, 833 F.2d at 1276, citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). Similarly, in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979), the Court held, "[t]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."

As this Court has recognized, once a physical taking is found, the property owner is entitled to compensation, without the need to analyze the extent of the taking or the degree of economic hardship it creates. "When faced with a constitutional challenge to a permanent physical occupation of real property, [this] Court has invariably found a taking . . . [w]ithout regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 427, and 434-35.

Pinewood, addressing claims nearly identical to those here, states (898 F.2d at 353):

> Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

Because it misapplied applicable takings jurisprudence, the California court failed to recognize that there had been a physical taking of Petitioners' property, regardless of compensation, a separate issue.

Petitioners and *amicus* need not attack *per se* the constitutional validity of rent control ordinances in general. Rather, their assertions are specifically directed at the Escondido ordinance's failure to include a provision for vacancy decontrol. It is this aspect of the ordinance which, in the statutory context, specifically creates the unconstitutional taking of which the mobile home park owners complain.

Because Escondido's ordinance lacks vacancy decontrol, a departing tenant who sells the personal property—the mobile home on the real property of the owner—at a park subject to the ordinance is able to realize a premium price for the personal property. This premium is related not to the mobile home, but to its location on the pad of a rent-controlled mobile home park. As the *Azul* and *Hall*

courts made quite clear, the amount of this premium is essentially the difference between the controlled and market rental levels, as slightly affected by the cost of moving the mobile home from a controlled to an uncontrolled location. "[T]he vacancy-control premium that represents the property right transferred from landlord to tenant is equal to the present value of the difference between the controlled rent and the market rent." *Azul*, 1991 U.S. App. LEXIS 26352 at *20.

Moreover, while this case comes to the Court from a dismissal, with no record to support these economic contentions, both *Hall* on remand and *Azul* have produced the evidence to support them. As the Ninth Circuit observed in *Azul*, "what was only a theory in Hall was found as fact by the district court." *Id.*, at *2. At the *Azul* trial, the city's expert did not deny that the absence of vacancy decontrol did, in fact, create a substantial premium attributable solely to that factor. The Ninth Circuit noted, 1991 U.S. App. LEXIS 26352 at *4-*5:

> In fact, both the plaintiff's and the defendant's experts agreed that there was a substantial premium paid on coaches in rent-controlled parks—they just calculated the amount differently.

Hall and *Azul* recognize, as the Court of Appeal did not, that there is a taking which rises to constitutional dimensions, in the form of a determinable premium taken from the owner and transferred to the tenant by the operation of the ordinance when synchronized with the California law.

While failing to respond substantively to the underlying basis for Petitioners' takings claim, the California Court of Appeal did attempt to undermine the foundation of *Hall* as authority by asserting that *Loretto*, on whose authority *Hall* rests, was severely limited by this

Court in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), decided, as the Court of Appeal noted, "six months after *Hall*." *Yee*, 224 Cal. App.3d at 1357.

However, that reliance on *Florida Power* as undermining *Hall* or *Loretto* is misplaced. *Florida Power* made clear that it did not involve a "physical occupation by one not chosen by the owner." *Florida Power*, 480 U.S. at 250. Contrary to the California court's position that "[n]othing [in the ordinance] requires [mobile home park owners] to rent their property to mobile home owners," the fact is that mobile home park owners are expressly prohibited by California's Mobilehome Residency Law from rejecting as tenants buyers of on-site mobile homes thrust upon them by the departing tenants, other than for narrowly specified reasons concerning prior violations of park rules or demonstrated inability to pay rent.

In this context it should be beyond any degree of caviling that the effect of the statute is precisely that of requiring the mobile home park owners to rent to those not of their selection, coupled with the ordinance's denial of compensation for that statutory taking, and thus to bring the ordinance precisely within the question reserved by the Court in *Florida Power*, the applicability of *Loretto* in the context of coerced, rather than voluntary, contracting.

This Court should declare the Escondido ordinance to be a taking for which compensation is constitutionally required.

II.

THE ESCONDIDO ORDINANCE DEPRIVES PETITIONERS OF DUE PROCESS OF LAW

The California Court of Appeal failed to apply the proper standard of judicial scrutiny to the Escondido Mobilehome

Rent Control Ordinance in the context of the California Mobilehome Residency Law. To be constitutionally valid, the ordinance must "substantially advance a legitimate state interest." *Nollan* v. *California Coastal Commission*, 483 U.S. at 841. Because the Ordinance fails to meet this test, it denies Petitioners due process of law under the Fifth Amendment as applied to states and municipalities by the Fourteenth Amendment to the Constitution.

This second fundamental flaw in the court's analysis is revealed in its acknowledged failure to understand in rejecting *Hall*, "Why the existing tenant's ability to 'monetize' the future rent control savings and recapture it from later tenants when the mobile home is sold is somehow critical to the takings analysis." *Yee*, 224 Cal. App.3d. at 1356. The California court concludes, "[i]f an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given." *Id.*

There are two glaring errors in that statement, either of which mandates reversal. First, the current tenant's ability to "monetize" the premium involved by transferring the right to lease a rent-controlled pad is significant because it demonstrates the possessory nature of the tenant's interest created by the ordinance, showing it to be the sort of physical taking which always gives rise to a right to compensation. As the Ninth Circuit explained in *Azul*, (1991 U.S. App. LEXIS 26352 at *36):

> The right of the tenant to transfer the property right created by the vacancy control provision distinguishes the physical occupations in this case and in *Hall* from rent control regulations that do not effect a taking. Unlike other types of rent control, mobile home vacancy control permits the outgoing tenant to preserve the benefits of rent control even after he no longer is renting. *Hall*, 833 F.2d at 1279. It is this ability of the tenants to monetize their rights that transforms the state's traditional power to regulate landlord-tenant relationships through rent control into a physical taking requiring compensation under the Fifth Amendment.

Second, because neither the taking authority nor the police power can be constitutionally exercised except in pursuit of a legitimate public use or interest, it is of fundamental constitutional consequence to whom the property has been given.

This Court's holdings make this second principle abundantly clear. The broadest reading by this Court of the "public purpose" limitation on the taking clause acknowledged that "[e]ven a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. . ." is prohibited by the Constitution. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). Thus, the California court's assertion that there can be no "constitutional consequence" to a transfer of the Petitioners' property to mobile home park tenants is simply untenable and erroneous.

As *amicus* has demonstrated, the effect of the Escondido ordinance coupled with California law is to take from the mobile home park owner and transfer to a current tenant the right to determine, essentially in perpetuity, continuing tenancy at the mobile home park without compensation for the taking. Instead, the ordinance permits tenants to collect monetary premiums from those to whom they transfer their continuing tenancy. It does so, moreover, without in the least serving any conceivable legitimate state interest which could justify the validity of the ordinance.

Assuming *arguendo* that the ordinance (like most rent control ordinances) is intended to relieve perceived unfairly high rentals based on some monopoly or near-monopoly allegedly enjoyed by mobile home park owners, and to assure "fair and reasonable," albeit "below-market," rents for such pads, there is simply no basis on which to conclude that policy is furthered by Escondido's ordinance. To the contrary, there is substantial evidence demonstrating the ordinance contradicts this intended purpose.

The purposes, as set forth by Respondent, of Escondido's ordinance are (Respondent's Brief in Opposition to the Petition for Certiorari at 27):

> "[T]o remedy an inequitable market situation caused by the scarcity of mobile home spaces by protecting mobile home owners from unreasonable space rental increases therefore protecting the home owners' investments, while also providing park owners with a just and reasonable return on the park owners' investment."

All available evidence and common sense, however, demonstrate that an ordinance like Escondido's, which imposes rent control and lacks vacancy decontrol, works to prevent, rather than to further, just these purposes.

There appears to be little if any dispute about the following:

1. Escondido claims the fundamental purpose of the ordinance is to protect mobile home owners from unreasonable space rental increases;

2. The effect of the ordinance, however, lacking vacancy decontrol and operating in the context of the restrictions imposed by the California Mobilehome Residency Law, is to substantially increase the purchase price paid to tenants who sell mobile homes located in rent-controlled mobile home parks;

3. The purchase price premium paid by individuals purchasing a mobile home in rent-controlled parks is directly related to the difference between the market rent which would be paid, absent rent control, and the rent set by the rent control authority. As *Azul* stated, the premium "is equal to the present value of the difference between the controlled rent and the market rent." 1991 U.S. App. LEXIS 26352 at *19; and

4. Because the ordinance in effect transfers the right to "sell" access to the rent-controlled mobile home space from the park owner to the current tenant, the premium paid by incoming tenants is paid to the current tenant and not the park owner.

Azul and *Hall* addressed the public interest claims of Escondido-type mobile home rent control ordinances. As the Court of Appeals observed in *Azul*, "[w]hat was only a theory in *Hall* was found as fact by the district court." 1991 U.S. App. LEXIS 26352 at *2.

With respect to the public interest allegedly being furthered by the rent control ordinance in *Azul*, the *Azul* court wrote in response to the City's argument that the ordinance protected tenants (1991 U.S. App. LEXIS 26352 at *17-*18):

> We have previously recognized in the substantive due process context that this is a valid basis for governmental regulation of the landlord-tenant relationship [citation omitted]. But the Supreme Court has held that the relationship between the means and the ends must be closer for purposes of takings clause analysis. *Nollan* v. *California Coastal Commission*, 483 US 825, 834-35 & n.3 (1987) . . . We interpret *Nollan* as holding that in cases brought under the takings clause we must undertake a close analysis of the means of protecting the asserted governmental interest.

Pursuant to that mandate, *Azul* examined the ordinance's purposes in light of the alleged governmental interest. The court found that the ordinance did not advance its stated goals, concluding that it did not reduce or hold down the costs for mobile home park tenants. Rather it merely transferred higher rental prices from mobile home park owners to existing tenants in the form of inflated mobile home prices. *Azul*, 1991 U.S. App. LEXIS 26352 at *19-*20:

> The vacancy control ordinance does nothing to protect mobile home buyers from the rigors of the marketplace. Instead it transfers the value of rent-controlled space—$20,880 per pad—from the mobile park landlord to the tenant. We are unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose.

In other words, the effect of the ordinance is to very substantially increase the cost to an incoming tenant of a mobile home because it sits on a rent-controlled pad. The incoming tenant pays a substantially higher rate than the departing tenant, not as rent, but in the form of the premium paid to the departing tenant for the sale of the mobile home. This premium is based not on the value of the mobile home, but on the basis of its location in a rent controlled mobile home park. This "rent" is paid up front, as an additional cost of the mobile home, and, worst of all from a constitutional perspective, it is paid to the wrong person. It is paid not to the owner of the pad, but to the seller of the mobile home. It is this "transfer" of "rent" which, most graphically, is the taking involved in this case.

Thus, with respect to the municipality's avowed purpose of protecting tenants from unreasonable rental levels, *Azul* concluded that because the ordinance lacked a vacancy

decontrol provision, it completely failed to further this stated end. Nevertheless *Azul* concluded that the ordinance, and specifically its lack of a vacancy decontrol provision, served the legitimate governmental purpose of "protect[ing] existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach. *Azul*, 1991 U.S. App. LEXIS 26352 at *20.

However, a closer look at this "purpose" indicates that it will not support the absence of vacancy decontrol. Contrary to the conclusion of *Azul*, the owner of a mobile home park under rent control including a vacancy decontrol provision would have precisely the opposite incentive from that hypothesized in *Azul*. Given an ordinance with vacancy decontrol, such an owner would rationally set rents for new tenants who have purchased units from existing tenants at a sufficiently low rate of increase to encourage such sales. Only through such resales could the park owner raise rents without petitioning the rent control board. As this analysis shows, the *Azul* court's "purpose" for the absence of vacancy decontrol evaporates and cannot support such an ordinance. The effect of such ordinances is in fact contrary to their declared purposes and, therefore, violative of the mobile home park owners' right to substantive due process under the Fifth and Fourteenth Amendments.

CONCLUSION

Rent control ordinances have regularly survived "takings" and other constitutional challenges. This Court has declined invitations to reconsider the constitutionality, *per se*, of rent control measures. While *amicus* believes that there are good reasons for the Court to reconsider this issue, this is neither requested by Petitioners nor necessary for the Court to declare unconstitutional mobile home rent controls without vacancy decontrol in the context of state laws mandating tenancy continuation rights on owners.

Amicus curiae IREM respectfully requests that this Court reverse the California Court of Appeal and remand this action to the California Superior Court for further proceedings consistent with a finding that the Escondido Mobilehome Rent Control Ordinance is unconstitutional and must be either declared invalid as violative of the substantive due process rights of mobile home park owners, or be construed as effecting a taking of the property of the mobile home park owners for which they are constitutionally entitled to just compensation.

Respectfully submitted,

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